Customs Bulletin and Decisions

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Bureau of Customs and Border Protection

General Notices

MONETARY GUIDELINES FOR SETTING BOND AMOUNTS FOR IMPORTATIONS SUBJECT TO ENHANCED BONDING REQUIREMENTS

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: General notice; request for comments.

SUMMARY: This Notice serves to provide additional information on the process used to determine bond amounts for importations involving elevated collection risks and to seek public comment on that process. The process published in this Notice is in effect. Public comments will assist CBP in identifying factors that may further improve the process to ensure the bond amounts protect the revenue and facilitate trade. After consideration of the comments, a revised version of the Monetary guidelines for Setting Bond Amounts Customs Directive 99–3510–004 July 23, 1991 (1991 Monetary Guidelines) will be published.

DATES: Comments must be received on or before December 26, 2006.

ADDRESSES: Commenters must submit comments, identified by docket number, by one of the following methods:

- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments via docket number USCBP–2006–0119.
- Mail: Trade and Commercial Regulations Branch, Office of Regulations and Rulings in the Office of International Trade, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW. (Mint Annex), Washington, DC 20229.

Instructions: All submissions received must include the agency name and docket number for this Notice. All comments received will be posted without change to http://www.regulations.gov, including any personal information provided. For detailed instructions on submitting comments, see the "Public Participation" heading of the SUPPLEMENTARY INFORMATION section of this document.

Docket: For access to the docket to read background documents or comments received, go to http://www.regulations.gov. Submitted comments may also be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Office of Regulations and Rulings in the Office of International Trade, Bureau of Customs and Border Protection, 799 9th Street, NW, 5th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: David Genovese, Office of International Trade at David.Genovese@dhs.gov, Tel: (202) 863–6020.

SUPPLEMENTARY INFORMATION:

PUBLIC PARTICIPATION

Interested persons are invited to submit written data, views, or arguments on all aspects of this Notice. CBP also invites comments that relate to the economic, environmental, or federalism effects that might result from this Notice. Comments that will provide the most assistance to CBP in developing these procedures will reference a specific portion of this Notice, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

BACKGROUND

A key CBP mission is to collect all import duties determined to be due to the United States. Under customs statutes and regulations release of merchandise prior to the determination of all duties that may be owed is ordinarily permitted, provided the importer posts a bond or other security to insure payment of duties and compliance with other applicable laws and regulations. Estimated duties are collected at entry, a bond is posted, and final duties await liquidation at a later point in time.

In the case of antidumping (AD) or countervailing duties (CVD) determined by the Department of Commerce (DOC) (which administers the AD/CVD laws in conjunction with the U.S. International Trade Commission), the administrative and judicial process for determining the appropriate rate of duty for AD/CVD merchandise may significantly delay the liquidation of an entry of AD/CVD merchandise. At liquidation, CBP follows DOC instructions regarding the applicable AD/CVD rate. CBP must collect the duties owed of whatever nature. However, importers have increasingly failed to pay additional AD/CVD duties determined to be due at liquidation. Recent defaults for AD/CVD supplemental bills are substantially

higher than defaults that were the previous norm and are unprecedented. This troubling trend caused an internal policy review of revenue protection strategies at CBP.

During the review, CBP reconsidered its general continuous bond formula which provides that the minimum continuous bond may be in an amount equal to the greater of $50,000 or ten percent of the amount of the previous year's duties, taxes and fees. In response to the growing collection problem, CBP announced an enhanced customs bonding requirement for those continuous bonds that secure the promise to pay all duties finally determined to be due on certain merchandise subject to AD/CVD. Amendment to Bond Directive 99–3510–004 for Certain Merchandise Subject to Antidumping Countervailing Duty Cases (July 9, 2004) (July 2004 Amendment to the Bond Guidelines); see also Clarification to the July 9, 2004 Amended Monetary Guidelines for Setting Bond Amounts (August 10, 2005) (August 2005 Clarification). Application of the enhanced bonding requirement thus far has been limited in scope—having been applied to merchandise subject to the first antidumping orders involving aquaculture merchandise imposed after issuance of the July 2004 Amendment to the Bond Guidelines. Aquaculture is the industry sector with the highest share of total defaults in recent years.

CBP commenced its policy of reviewing the sufficiency of continuous bonds related to imports of AD/CVD merchandise with the release of its July 2004 Amendment to the Bond Guidelines. That document and the August 2005 Clarification were posted on CBP's website.

The bond guidelines are designed to ensure the amount of the continuous bond reflects a reasonable amount necessary to secure against non-payment of any additional revenue ultimately legally owed and not paid in cash deposits at entry. As noted earlier, U.S. laws and regulations afford importers the opportunity to post such bonds in order to facilitate prompt release of the goods at the border without creating an undue burden on importers or international trade and commerce.

CBP includes guidelines on determining sufficient bond amounts in its regulations at 19 CFR §113.13. The regulations direct CBP to review bonds periodically and to notify the principal in writing if CBP determines the bond amount is insufficient to adequately protect the revenue and ensure compliance with U.S. laws and regulations. The principal has 30 days from date of notification to remedy the deficiency. During those 30 days, principals have frequently requested CBP to adjust its bond determination.

This Notice seeks public comment on the procedures for setting bond amounts on merchandise subject to increased default risk and,

therefore, designated as Special Category Merchandise that may be subject to enhanced bonding requirements. An explanation of Special Category Merchandise appears later in this document under "Procedures for Setting Bond Amount." History of compliance with customs laws and regulations, ability to pay, existence of assets available as recourse for nonpayment, past payment history, similarity to previous circumstances giving rise to uncollected revenue problems, and other relevant factors will be considered in determining whether to reduce the bond amount otherwise required under the enhanced bond formula. Importers will be offered the opportunity to submit information on their financial condition related to the risk of noncollection for that importer and CBP will determine bond amounts based on that information, the importer's compliance history and other relevant information available to CBP. In the absence of a submission by the importer, CBP would calculate the bond amount using the formulas set forth below.

This document will be incorporated into the 1991 Monetary Guidelines and represents the comprehensive and exclusive statement of the policy and processes expressed in the July 2004 Amendment to the Bond Guidelines, the Bond Formulas posted on CBP's website, and the August 2005 Clarification. After consideration of any comments received, an incorporated policy will be published.

PROCEDURE FOR SETTING BOND AMOUNT

In order to provide a consistent bond formula and to ensure the bond amounts protect the revenue and facilitate trade, CBP issued bond guidelines. Under the August 2005 Clarification, CBP indicated that it would designate Special Categories of Merchandise and designate Covered Cases within those Special Categories. CBP will continue to evaluate on an industry wide basis those types of merchandise where additional bond requirements may be needed. However, because importers are only affected when merchandise is subject to different bond requirements, CBP will only designate Special Categories, that is, merchandise for which an enhanced bond amount may be required.

Designation of Special Categories

- Special Categories may be designated when additional bond requirements in the form of greater continuous entry bonds or other security may be required.
- At least 60 days before new bonding requirements take effect, CBP will provide public notice of designation of a Special Category in the Customs Bulletin and on the CBP's website (www.cbp.gov). The notice will solicit comment from affected parties and will provide a description of the reasons for the Special Category. Affected parties will have 30 days from the date the designation notice is published to submit comments.

- When conditions no longer exist that warrant the Special Category designation, the designation will be removed and the public will be notified through the Customs Bulletin and the CBP website.

Criteria for Special Categories

In considering which merchandise should be designated Special Category merchandise subject to enhanced bond requirements, the following criteria shall be considered:

1. Previous collection problems concerning the industry involved;
2. The similarity to previous imports or industries experiencing uncollected revenue problems;
3. Payment history;
4. Indications that liquidated duty rates may exceed existing security;
5. Any other factors that are deemed relevant.

All Special Categories will be monitored on a regular basis to determine whether a material change in factors has occurred so that the amount of the required bond for the Special Categories should be adjusted up or down or that the conditions that warranted the designations no longer exist.

Continuous Bond Formulas for Special Category Merchandise

CBP will review the sufficiency of bonds covering Special Category merchandise. Importers of Special Category merchandise may be required to obtain larger continuous bonds. In such circumstances, importers will be offered the opportunity to submit information on their financial condition related to the risk of non-collection for that importer, and CBP will determine bond amounts based on that information, the importer's compliance history, and other relevant information available to CBP. In the absence of a submission by the importer, CBP may calculate the bond amount using the formulas determined on the basis of the risk of non-collection posed by the Special Category merchandise. These formulas may be adjusted in accordance with the revenue risks identified for future importations of designated Special Category merchandise.

For Special Category merchandise which is merchandise subject to AD/CVD, the formulas determined on the basis of the risk of non-collection will be based upon the importer's previous 12 months cumulative import value of merchandise subject to the AD/CVD Order and the rate that the DOC establishes in its Order or, if the bond amount is established after an administrative review, it will be calculated using the rate determined by DOC in the most recent admin-

istrative review. The amount of additional coverage will be calculated using the following formula:

- AD/CVD rate established in DOC Order (or the rate established in the most recently completed administrative review) × previous 12 months' cumulative import value of subject merchandise.

For example, if an importer has imported $1 million of the subject AD/CVD merchandise during the previous 12 months and the DOC rate is 40%, the importer's continuous bond amount will be increased by $400,000.

For new importers with no prior history of imports who import Special Category merchandise subject to AD/CVD, the continuous bond will be calculated in accordance with the following formula:

- DOC deposit rate in effect on date of entry × the importer's estimated annual value of imported goods subject to the case.

Periodic reviews will be conducted to monitor the sufficiency of the continuous bonds for Special Category merchandise. CBP may adjust the rates in the formulas set forth above to calculate different bond amounts as circumstances warrant. CBP is committed to protecting its ability to collect the amount of money determined to be due at liquidation and to requiring continuous bonds in an amount reasonably necessary to cover its additional financial risk.

Absent exceptional circumstances, the above formulas will determine the bond amounts where a submission has not been made by the principal. Nothing in this policy affects the CBP's authority to require additional security if CBP believes that acceptance of a transaction secured by a continuous bond would place the revenue in jeopardy or otherwise hamper the enforcement of customs laws or regulations.

Notice Timing and Adjustment Factors for Individual Importers

In implementing the bond requirements for imports of Special Category merchandise, CBP shall:

1) Provide the principal subject to the revised bond requirements with notice of the new bond requirements not less than 30 days before the revised requirements will take effect. Such notice will include a description of the rationale for the new requirements and offer the principal the opportunity to submit information on its financial condition related to the risk of non-collection of that principal, which CBP will use along with other information, such as the importer's compliance history, to determine bond amounts. The notice will inform the principal that in the absence of a submission by the principal, CBP may calculate the bond amount using the formulas determined on

the basis of the risk of non-collection for the Special Category merchandise. The notice will provide examples of additional information that might be submitted in support of the former calculation, how the bond amount would be calculated if the formula were applied, and a description of the procedures for responding to the notice.

2) Provide the principal 30 days from the date of the mailing of the notice to respond, including by providing evidence of factors that could support a bond amount other than that resulting from the formula. Such responses may be filed individually or by groups of principals who share common characteristics. Principals who import from the same foreign manufacturer/exporter share common characteristics. Depending upon available resources and workload, CBP shall endeavor to issue decisions to those who respond within 45 days of receipt of a complete, legible response and, in any event, shall issue decisions within a reasonable time. The new bond requirement will not take effect with respect to a principal until 14 days after the date of CBP's reply to the principal's response. The reply to the principal will include the rationale for the determination. In the absence of a submission by the principal, CBP may calculate the bond amount using the formulas determined on the risk of non-collection posed by the Special Category merchandise as provided in the notice. The bond requirement will take effect with respect to that principal 30 days after the date of the mailing of the notice.

3) Consistent with 19 CFR §113.13(b), consider the following factors when determining a bond amount, other than the amount resulting from the formula, for a principal who has responded in accordance with (2) above:

a) The prior record of the principal regarding timely payment of duties, taxes and charges with respect to the transactions involving such payments;

b) The prior record of the principal in complying with CBP demands for redelivery, the obligation to hold unexamined merchandise intact, and other requirements relating to enforcement and administration of CBP and other laws and regulations;

c) The value and nature of the merchandise involved in the transaction(s) to be secured;

d) The degree and type of supervision that CBP will exercise over the transaction(s);

e) The prior record of the principal in honoring bond commitments, including the payment of liquidated damages and AD/CVD;

f) Any additional information contained in any application for a bond, or contained in any request for adjustment of the bond amount, including information that provides proof of ability to pay such as independently audited financial statements, tax returns submitted by the principal, availability of assets, including securities in the United States and elsewhere, credit rating, and length of time in business; and

g) Any other relevant information.

4) If CBP determines that the principal has a record of compliance with customs laws and regulations and that the principal has demonstrated an ability to pay, CBP may decide not to require an increased bond amount even though the principal imports Special Category merchandise.

A request for reconsideration may be made by submitting a new bond application and CBP Form 301 at any time after six months from the date of the notice of new bond amount set forth in paragraph (1) above, if no response to CBP's notice was received under paragraph (2). If the principal filed a response under paragraph (2) requesting a bond amount other than that resulting from the formula, the principal may request further reconsideration at any time after six months from the date of the decision issued under paragraph (2). A request for reconsideration of the bond amount based on a material error by CBP that affects the bond amount may be made at any time.

At any time after CBP determines a bond amount for a principal below that provided by the formula, if the principal fails to remain compliant with customs laws and regulations, CBP will recalculate the principal's bond amount in accordance with the formulas outlined in this notice.

Affected Parties

This Notice affects only continuous bonds for imports of Special Category merchandise. This Notice does not affect laws and regulations regarding cash deposits or other security with respect to merchandise subject to AD/CVD proceedings. CBP notes those initial deposits and bonds sometimes are not sufficient to cover the final assessed duty liabilities. Defaults on such additional duty liability have increased. Congress has provided CBP authority to require security in order to ensure the payment of all duties determined to be due to the United States, including any revenue collection gaps between estimated duty deposits and final assessed duties that the importer fails to satisfy. Please note that this Notice does not limit CBP's authority to require additional security under 19 CFR

§113.13(d) and the requirements of the 1991 Monetary Guidelines remain in effect consistent with this Notice.

Dated: October 20, 2006

DEBORAH J. SPERO,
Acting Commissioner,
Customs and Border Protection.

[Published in the Federal Register, October 24, 2006 (71 FR 62276)]

19 CFR Part 123

Required Advance Electronic Presentation of Cargo Information for Truck Carriers: ACE Truck Manifest

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Pursuant to section 343(a) of the Trade Act of 2002 and implementing regulations published in December, 2003, truck carriers and other eligible parties were directed to transmit advance electronic truck cargo information to the Bureau of Customs and Border Protection (CBP) through a CBP-approved electronic data interchange (EDI). This Notice announces that CBP is designating the Automated Commercial Environment (ACE) Truck Manifest System as the approved EDI for the transmission of the required data and that the requirement that advance electronic truck cargo information be transmitted through ACE will be phased in by groups of ports of entry identified in this document.

DATES: Trucks entering the United States through all ports of entry in the states of Washington and Arizona and through the ports of Pembina, Neche, Walhalla, Maida, Hannah, Sarles and Hansboro in North Dakota will be required to transmit the advance information through the ACE Truck Manifest system effective January 25, 2007. ACE will be phased in as the mandatory transmission system for the other ports identified in this notice in the sequential order that they are listed, following publication of 90 days notice in the **Federal Register** for each group of ports.

FOR FURTHER INFORMATION CONTACT: James Swanson, Field Operations, (202) 344–2576.

SUPPLEMENTARY INFORMATION:

Background

Section 343(a) of the Trade Act of 2002, as amended (the Act; 19 U.S.C. 2071 note), required that CBP promulgate regulations providing for the mandatory transmission of electronic cargo information by way of a CBP-approved electronic data interchange (EDI) system before the cargo is brought into or departs the United States by any mode of commercial transportation (sea, air, rail or truck). The cargo information required is that which is reasonably necessary to enable high-risk shipments to be identified for purposes of ensuring cargo safety and security and preventing smuggling pursuant to the laws enforced and administered by CBP.

On December 5, 2003, CBP published in the **Federal Register** (68 FR 68140) a final rule to effectuate the provisions of the Act. In particular, a new section 123.92 (19 CFR 123.92) was added to the regulations to implement the inbound truck cargo provisions. Section 123.92 describes the general requirement that, in the case of any inbound truck required to report its arrival under section 123.1(b), if the truck will have commercial cargo aboard, CBP must electronically receive certain information regarding that cargo through a CBP-approved EDI system no later than 1 hour prior to the carrier's reaching the first port of arrival in the United States. For truck carriers arriving with shipments qualified for clearance under the FAST (Free and Secure Trade) program, section 123.92 provides that CBP must electronically receive such cargo information through the CBP-approved EDI system no later than 30 minutes prior to the carrier's reaching the first port of arrival in the United States.

ACE Truck Manifest Test

On September 13, 2004, CBP published a general notice in the **Federal Register** (69 FR 55167) announcing a test allowing participating Truck Carrier Accounts to transmit electronic manifest data for inbound cargo through ACE, with any such transmissions automatically complying with advance cargo information requirements as provided in section 343(a) of the Trade Act of 2002. Truck Carrier Accounts participating in the test have the ability to electronically transmit the truck manifest data and obtain release of their cargo, crew, conveyances, and equipment via the ACE Portal or electronic data interchange messaging.

A series of notices have announced additional deployments of the test, with deployment sites being phased in as clusters. Clusters were announced in subsequent notices published in the **Federal Register** including: 70 FR 30964, published on May 31, 2005; 70 FR 43892, published on July 29, 2005; 70 FR 60096, published on Octo-

ber 14, 2005; 71 FR 3875, published on January 24, 2006; and 71 FR 23941, published on April 25, 2006.

The use of ACE to transmit advance electronic truck cargo information will not be required in any port in which CBP has not first conducted the test. ACE will be phased in as the required transmission system at some ports even while it is still being tested at other ports. CBP will continue, as necessary, to announce in subsequent notices in the **Federal Register** the deployment of the ACE truck manifest system test at additional ports.

Designation of ACE Truck Manifest System as the Approved Data Interchange System

Throughout the deployment process, CBP and system users from the trade have expended considerable resources in a collaborative effort to test the ACE Truck Manifest System. This collaboration has helped correct operational difficulties, improve processing times, and develop system enhancements not present in the original configuration. Full implementation of the enhancements will occur over the next few months. Accordingly, CBP has determined that the ACE Truck Manifest System should be mandated for all and is the approved EDI system for transmission of the advance information required pursuant to section 343(a) of the Trade Act of 2002 and the implementing regulations.

Section 123.92(e) of the regulations (19 CFR 123.92(e)) requires CBP, 90 days prior to mandating advance electronic information at a port of entry, to publish notice in the **Federal Register** informing affected carriers that the EDI system is in place and fully operational. Effective 90 days from the date of publication of this notice, truck carriers entering the United States through all ports of entry in the states of Washington and Arizona and through the ports of Pembina, Neche, Walhalla, Maida, Hannah, Sarles and Hansboro in North Dakota, will be required to present advance electronic cargo information regarding truck cargo through the ACE Truck Manifest. CBP will be publishing notice in the **Federal Register** as it phases in the requirement that truck carriers utilize the ACE system to present advance electronic truck cargo information at other ports.

Although other systems that have been deemed acceptable by CBP for transmitting advance truck manifest data will continue to operate and may still be used in the normal course of business for purposes other than transmitting advance truck manifest data, use of systems other than ACE will no longer satisfy advance electronic cargo information requirements at a particular port of entry once the 90 day notice for that port has been published and the 90 day period has elapsed.

Compliance Sequence

At all ports of entry in the states of Washington and Arizona, and the ports of Pembina, Neche, Walhalla, Maida, Hannah, Sarles, and Hansboro in North Dakota, ACE will be the mandatory truck cargo information transmission system as of January 25, 2007.

Subsequently, ACE will continue to be phased in as the mandatory EDI system, at the ports identified below in the sequential order of the group in which they are listed. As mandatory ACE is phased in at these remaining ports, CBP will provide 90 days' notice through publication in the **Federal Register** prior to requiring the use of ACE for the transmission of advance electronic truck cargo information at a particular group of ports.

The remaining ports at which the mandatory use of ACE will continue to be phased in are divided into 5 groups, listed in sequential order, as follows:

1. All ports of entry in the states of Michigan, Texas, California, New Mexico, and New York.
2. All ports of entry in the states of Vermont and Alaska.
3. All ports in the states of Maine, Idaho, and Montana.
4. All remaining ports in the state of North Dakota (those not identified as having a specific compliance date).
5. All ports in the state of Minnesota.

Dated: October 23, 2006

DEBORAH J. SPERO,
Acting Commissioner,
Customs and Border Protection.

[Published in the Federal Register, October 27, 2006 (71 FR 62922)]

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, October 25, 2006

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,
Executive Director,
Regulations and Rulings,
Office of International Trade.

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF A CERTAIN FLORAL PORCELAIN VASE FROM CHINA

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: Notice of revocation of ruling letter and treatment relating to the tariff classification of a certain floral porcelain vase from China.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that CBP is revoking a ruling relating to the classification of a certain floral porcelain vase under the Harmonized Tariff Schedule of the United States (HTSUS), and revoking any treatment CBP has previously accorded to substantially identical transactions. Notice of the proposed action was published in the Customs Bulletin, Vol. 40, No. 38, on September 13, 2006. No comments were received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after January 8, 2007.

FOR FURTHER INFORMATION CONTACT: Heather K. Pinnock, Tariff Classification and Marking Branch, at (202) 572–8828.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended and related laws. Two new concepts, which emerge from the law, are **informed compliance** and **shared responsibility.** These concepts are based on the premise that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's rights and responsibilities under customs and related laws. In addition, both the trade community and CBP share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify, and declare value, on imported merchandise, and to provide other necessary information to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the Customs Bulletin, Vol. 40, No. 38, on September 13, 2006, proposing to revoke one ruling letter relating to the tariff classification of a certain floral porcelain vase from China. No comments were received in response to the notice. As stated in the proposed notice, this modification will cover any rulings on the subject merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the ruling identified above. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised CBP during this notice period.

Similarly, pursuant to section 625 (c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment it previously accorded to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. §1625(c)(1), CBP is revoking NY L88645 to reflect the proper tariff classification of the merchandise under heading 6913, HTSUS, specifically in subheading 6913.10.5000, HTSUSA, which provides for: "statuettes and other ornamental ceramic articles: of porcelain or china: other: other", pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 968347 (Attachment). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment it previously accorded to substantially identical transactions.

In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

DATED: October 24, 2006

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 968347
October 24, 2006
CLA-2 RR:CTF:TCM 968347 CAM
CATEGORY: Classification
TARIFF NO.: 6913.10.5000

MS. FRANCINE MARCOUX
HAMPTON DIRECT
350 Pioneer Drive
P.O. Box 1199
Williston, VT 05495

RE: Revocation of NY L88645; Floral Porcelain Vase From China

DEAR MS. MARCOUX:

In New York Ruling Letter (NY) L88645, dated November 28, 2005, a floral porcelain vase from China that your company manufactures was classified in subheading 6911.90.0050 under the Harmonized Tariff Schedule of the United States (HTSUS), which provides for: "tableware, kitchenware, other household articles and toilet articles of porcelain or china: other, other." Customs and Border Protection (CBP) has reviewed NY L88645, and has found that ruling to be in error.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation was published on September 13, 2006, in the Customs Bulletin, Volume 40, No. 38. No comments were received in response to this notice.

FACTS:

The subject merchandise is a fluted vase made of porcelain that measures 4.5 inches in length by 4.5 inches in width by 7.25 inches in height. On the side of the vase is a floral design. The descriptive information concerning the vase indicates that it is suitable for holding flowers.

In NY L88645, the floral porcelain vase was classified in subheading 6911.90.0050, HTSUS, which provides for: "tableware, kitchenware, other household articles and toilet articles of porcelain or china: other, other." Classification in subheading 6913.10.5000, HTSUS, which provides for: "statuettes and other ornamental ceramic articles: of porcelain or china: other: other" was never considered. Based on our review of this matter, CBP is of the view that the floral porcelain vase should be classified in heading 6913, HTSUS.

ISSUE:

What is the proper classification under the HTSUS of the subject floral porcelain vase?

LAW AND ANALYSIS:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not require otherwise, then CBP may apply the remaining GRIs.

In interpreting the headings and subheadings, CBP looks to the Harmonized Commodity Description and Coding System Explanatory Notes (ENs), which constitute the official interpretation of the HTSUS. While not legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and, generally, indicate the proper interpretation of headings. See T.D. 89–80, 54 FR 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

6911	Tableware, kitchenware, other household articles and toilet articles, of porcelain or china:
	* * *
6911.90.00	Other
	* * *
6911.90.0050	Other
6913	Statuettes and other ornamental ceramic articles:
6913.10	Of Porcelain or china:
	* * *
	Other:
	* * *
6913.10.5000	Other

The Explanatory Notes (ENs) to heading 6911 direct us to the ENs to heading 6912 for guidance. The ENs to 6912 list the following merchandise

as coming within the scope of that heading, which provides for, in relevant part:

> (A) Tableware such as tea or coffee services, plates, soup tureens, salad bowls, dishes and trays of all kinds, coffee-pots, teapots, sugar bowls, beer mugs, cups, sauce-boats, fruit bowls, cruets, salt cellars, mustard pots, egg-cups, teapot stands, table mats, knife rests, spoons and serviette rings.
>
> * * *
>
> (C) Other household articles such as ash trays, hot water bottles and match box holders.
>
> * * *

In the instant case, the subject merchandise is not specifically listed in the items enumerated in the above-described ENs.

More significantly, the ENs to heading 6911 state that the heading excludes "statuettes and other ornamental articles of heading 6913." Accordingly, the floral porcelain vase is not classified in heading 6911, HTSUS, if CBP determines that the subject merchandise is classified in heading 6913, HTSUS.

CBP finds that the subject merchandise meets the terms of heading 6913, HTSUS, because the floral vase is an ornamental article made of porcelain. The ENs to heading 6913, HTSUS, support the inclusion of the subject merchandise in that heading. The ENs state that heading 6913 includes the following:

> (A) Articles which have no utility value but are wholly ornamental, and articles whose only usefulness is to support or contain other decorative articles or to add to their decorative effect, e.g.:
>
> * * *
>
> (3) Purely ornamental table-bowls, vases, pots, jardinières.

Like the merchandise described in EN (A), the subject merchandise is "wholly ornamental" and has the primary function of containing "other decorative articles," in this case flowers, in order to add to the decorative effect. Additionally, EN (A)(3) specifically states that heading 6913, HTSUS, covers vases. The description provided in the ENs to heading 6913, HTSUS, supports CBP's finding that the subject merchandise is classifiable in that heading.

As the subject merchandise is classifiable in heading 6913, it is excluded from classification in heading 6911. This classification is supported by several rulings in which CBP has classified porcelain vases like the subject merchandise in heading 6913, HTSUS. In Headquarters Ruling Letter (HQ) 951608, dated August 12, 1992, CBP determined that an 11-inch round porcelain vase was an ornamental article classifiable in heading 6913, HTSUS. In that ruling CBP referenced EN (A)(3) to heading 6913, HTSUS, and noted that the primary use of the vase was to support other decorative articles. Likewise, in HQ 952168, dated August 20, 1992, CBP classified porcelain vases shaped like bags, napkins, fans, and bouquets in heading 6913, HTSUS. Various other rulings have classified similar merchandise in heading 6913, HTSUS. See HQ 966040, dated April 1, 2003; HQ 086100, dated April 3, 1990; see also NY J83610, dated April 29, 2003; NY F84574, dated

April 5, 2000; NY B85211, dated May 7, 1997; NY B88384, dated September 8, 1997; NY A86551, dated August 30, 1996.

HOLDING:

By applying GRI 1, the floral porcelain vases are classified in heading 6913, specifically subheading 6913.10.5000, HTSUS, which provides for: "statuettes and other ornamental ceramic articles: of porcelain or china: other: other." The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY L88645, dated November 28, 2005, is revoked. In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Gail A. Hamill for MYLES B. HARMON,
Director.
Commercial & Trade Facilitation Division.

SLIP OP. 06–156

UNITED STATES, Plaintiff, v. UPS CUSTOMHOUSE BROKERAGE, INC., dba UPS SUPPLY CHAIN SOLUTIONS, INC., Defendant.

BEFORE: CARMAN, JUDGE

Court No. 04–00650

[Defendant's motions to certify order for interlocutory appeal, to stay proceedings, and for leave to file a reply brief are granted. Defendant's motion for oral argument is denied.]

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Melinda D. Hart*, *Nancy Kim*), *Edward Greenwald*, Department of Homeland Security, Bureau of Customs and Border Protection, Of Counsel, for Plaintiff.

Akin, Gump, Strauss, Hauer & Feld, LLP (*Lars-Erik Hjelm*, *Lisa W. Ross*, and *Thomas J. McCarthy*), Washington, D.C., for Defendant.

Tompkins & Davidson, LLP (*Laura Siegel Rabinowitz*), New York, New York, for Amicus (National Customs Brokers & Freight Forwarders Association of America, Inc.).

October 19, 2006

OPINION & ORDER

CARMAN, JUDGE: This matter is before this Court on Defendant's Motion to Amend and Certify Order for Interlocutory Appeal and for Stay of the Proceeding Pending Appeal ("Defendant's Motion to Certify"). Plaintiff filed a response to Defendant's Motion to Certify in Plaintiff's Opposition to Defendant's Motion to Amend and Certify Order for Interlocutory Appeal and for Stay of the Proceeding Pending Appeal ("Plaintiff's Response"). Thereafter, Defendant filed Defendant's Motion for Leave to File a Reply to Plaintiff's Opposition to Defendant's Motion for Amendment and Certification of Order for Interlocutory Appeal and Defendant's Motion for Oral Argument ("Defendant's Reply"). This Court, having considered all of the papers and arguments contained therein, after due deliberation, and

for the reasons set forth herein, grants Defendant's Motion to Certify, together with Defendant's motions to stay proceedings and for leave to file a reply brief. The parties having ably and clearly set forth their arguments in their papers this Court denies Defendant's motion for oral argument.

PROCEDURAL HISTORY

The factual and procedural history of this matter are fully addressed in this Court's prior opinion in this matter, 30 CIT ___ , Slip Op. 06–98 (June 28, 2006) ("*UPS I*"). This Court presumes familiarity with the *UPS I* opinion. Briefly, the Bureau of Customs and Border Protection ("Plaintiff" or "Customs") imposed a series of separate penalties against Defendant, UPS Customhouse Brokerage, Inc. ("UPS" or "Defendant"), for alleged violations of the broker's statutory obligation to exercise responsible supervision and control. The alleged violations each related to UPS's failure, after repeated counseling and warning by Customs, to properly classify certain computer equipment. Defendant remitted payment for three of the penalty notices but failed to satisfy other penalty notices, and this action ensued.

The substantive legal issue before this Court in *UPS I* was "the meaning of the statutory phrase 'a monetary penalty not to exceed $30,000 in total for a violation or violations of' 19 U.S.C. § 1641(d)(1)."[1] *UPS I* at 27 (*quoting* section 641(d)(2)(A) of the Tariff Act of 1930, 19 U.S.C. § 1641(d)(2)(A) (2000) ("§ 1641(d)(2)(A)").[2] With regard to this issue, Defendant filed a motion for summary judgment seeking to limit the amount of penalties to which it would be subject. This Court, in *UPS I*, rejected Defendant's claims. *Id.* at 27–36. Defendant, being dissatisfied with the Court's holding in *UPS I*, filed its Motion to Certify. While this Court is confident in its reasoning and holding in *UPS I*, the substantive question of law presented therein nevertheless satisfies the requirements necessary to be certified for interlocutory appeal to the Court of Appeals for the Federal Circuit ("CAFC"). A Court of International Trade ("CIT") judge may certify an order not otherwise immediately appealable provided "a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ul-

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[1] Section 641(d)(1)(C) of the Tariff Act of 1930, 19 U.S.C. § 1641(d)(1)(C) (2000), permits Customs to impose a monetary penalty when a broker "has violated any provision of any law enforced by the Customs Service or the rules or regulations issued under any such provision."

[2] Section 1641(d)(2)(A) states in relevant part that "the appropriate customs officer shall serve notice in writing upon any customs broker to show cause why the broker should not be subject to a monetary penalty not to exceed $30,000 in total for a violation or violations of this section."

timate termination of the litigation." 28 U.S.C. § 1292(d)(1) (2000) ("§ 1292(d)").

PARTIES' CONTENTIONS

I. *Defendant's Contentions*

Defendant asks this Court to certify the following question for immediate appeal to the CAFC:

> Whether, under 19 U.S.C. §§ 1641(b)(4)[3] and (d)(2)(A), a Customs broker's alleged failure to exercise responsible supervision and control on the basis of a pattern of entries reflecting the same tariff classification error gives rise to one, or more than one, penalty; and whether there is any limitation on the total penalty amount for the allegedly misclassified entries resulting therefrom.

(Mem. in Supp. of Def.'s Mot. to Amend & Certify Order for Interlocutory Appeal & for Stay of the Proceeding Pending Appeal ("Def.'s Mem.") 1 (footnote added).) Defendant defines the issue for certification to the CAFC as "whether Plaintiff may assess more than a single penalty for [UPS's] alleged failure to exercise responsible supervision and control over the classification of computer parts." (Def.'s Reply to Pl.'s Opp'n to Def.'s Mot. for Amendment & Certification of Order for Interlocutory Appeal ("Def.'s Reply") 3–4.) According to Defendant, resolution of this issue "goes directly to the heart of whether Defendant is liable for any additional penalties in this case." (*Id.* at 4.)

In satisfaction of the first requirement of § 1292(d), Defendant argues that a controlling question of law is presented in *UPS I* because "[i]f the [CAFC] agrees with Defendant that Plaintiff has alleged a single violation, namely the failure to exercise responsible supervision and control . . . over the classification of computer parts, it follows that only a single penalty is warranted." (Def.'s Mem. 8.) If so, Defendant claims that Plaintiff would then be unable to maintain this action because "Customs has already collected a penalty for the alleged failure to exercise responsible supervision and control over the classification of computer parts." (*Id.*) At a minimum, Defendant argues that there is a controlling question of law concerning the maximum amount of penalties Customs may seek through a single penalty notice or multiple penalty notices. (*Id.*)

Next, Defendant claims that the second requirement of § 1292(d)–that there exist a substantial ground for difference of opinion–is met. (*Id.* 8–9.) Defendant alleges that *UPS I* conflicts with an earlier CIT

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[3] Section 641(b)(4) of the Tariff Act of 1930, 19 U.S.C. § 1641(b)(4) (2000), requires a customs broker to "exercise responsible supervision and control over the customs business that it conducts."

case, *United States v. Ricci*, 21 CIT 1145, 985 F. Supp. 1145 (1997). Defendant takes issue with *UPS I* for distinguishing *Ricci* because the penalty issued therein–unlike in the matter before this Court–was the result of an audit by Customs. (Def.'s Mem. 9.) Defendant asserts that the audit provisions of the Customs penalty mitigation guidelines ("mitigation guidelines") were not invoked in *Ricci* and, therefore, were not a means by which to distinguish the case in *UPS I*. (*Id.* at 9.) Defendant also suggests that this Court should not have referenced the audit provisions of the mitigation guidelines because they ' "do not have the force of a statute or regulation.' " (*Id.* (*quoting Ricci*, 21 CIT at 1147).)[4] Defendant maintains that *Ricci* established that § 1641(d)(2)(A) does not permit Customs to issue more than one penalty for more than one violation of a broker's statutory obligations. (Def.'s Reply 7.) To the extent that *UPS I* and *Ricci* differ in this regard, Defendant urges that there exists a difference of opinion ripe for resolution on interlocutory appeal.

In discussing the third requirement of § 1292(d), Defendant postulates that an interlocutory appeal of *UPS I* will "expeditiously settle the most significant legal principle at stake in this dispute." (Def.'s Mem. at 10.) Defendant seems to imply that resolution of this issue also may result in settlement or at least renewed settlement discussions between the parties. (*See Id.* at 11; Def's Reply 9.) Defendant further contends that there remain "significant and genuine issues of material fact" regarding Plaintiff's underlying claims. (Def.'s Mem. 12.) According to Defendant, the "significant expense" of trial concerning the outstanding factual issues might be "avoided completely by certification of immediate appeal." (*Id.*) Defendant insists that "the question for certification goes directly to the issue of [UPS's] liability for additional penalty payments and provides the basis for extinguishing Plaintiff's claim in its entirety." (Def.'s Reply 8.) Defendant adds that

> The issue for certification is a pure question of law that requires the [CAFC] to rule on the meaning of the statute and applicable regulations. As such, it is one that can be decided relatively quickly and which may avoid a lengthy and time-consuming trial for both parties.

(*Id.* at 9.) Defendant further asserts "that the alternative to immediate review is to proceed with a costly trial, and possible re-trial, of significant factual issues of liability and penalty exposure that can be entirely avoided by an interlocutory appeal at this stage." (*Id.*) Defendant also notes that the issue raised in *UPS I* is one of first im-

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[4] This Court duly addressed this argument in *UPS I* by stating that "[w]hile the mitigation guidelines were not subject to notice and comment, they are 'still entitled to some deference, since [they are] a 'permissible construction of the statute.' " *UPS I*, Slip. Op. 06–98 at 32 (*quoting Reno v. Koray*, 515 U.S. 50, 61 (1995)).

pression and "has a potentially significant and wide-reaching impact on the entire customs brokerage industry." (Def.'s Mem. 10.)

With regard to staying the proceedings, Defendant states that neither Plaintiff nor Defendant will be prejudiced by delaying the proceedings pending appeal. (Def.'s Reply 10.) Defendant notes that Plaintiff proposed that the trial in this matter be rescheduled for March 2007. (*Id.*) According to Defendant, "Plaintiff's contention that a stay of proceedings pending appeal 'would prejudice the Government's interest in a speedy resolution of its claim' is simply baseless." (*Id.* (citation omitted).) Defendant reasons that "Plaintiff's opposition to certification of this issue–which is more attributable to a desire to avoid potential reversal than by a concern for a speedy resolution of this litigation–that would continue to subject both parties and this Court to significant and unnecessary delay and expense." (*Id.*)

II. *Plaintiff's Contentions*

Plaintiff opposes the Motion to Certify and argues that the issue decided in *UPS I* involved a "straightforward application of settled case law . . . to undisputed facts, and an equally straightforward analysis of regulatory provisions under these settled legal principles." (Pl.'s Opp'n to Def.'s Mot. to Amend and Certify Order for Interlocutory Appeal & for Stay of the Proceeding Pending Appeal ("Pl.'s Resp.") 3.) For this reason, Plaintiff argues that no controlling question of law is presented by *UPS I*. (*Id.*) Plaintiff also contends that interlocutory appeal of this matter will likely not result in resolution of "two important issues: (1) liability and (2) additional penalty payments." (*Id.*) Consequently, Plaintiff insists that the issue decided in *UPS I* "cannot reasonably be regarded as 'controlling,' because interlocutory review would not terminate this action, but merely delay and extend proceedings through piecemeal litigation and appellate review." (*Id.* at 4.) In addition, Plaintiff complains that "UPS's motion would require the [CAFC] to engage in an unworkable and fact-laden inquiry concerning the purportedly **related** and **unrelated violations** occurring in this action." (*Id.*)

Next, Plaintiff takes issue with Defendant's assertion that *Ricci* provides the basis to establish that a difference of opinion exists sufficient to warrant interlocutory appeal. (*Id.* at 5.) Plaintiff points out that the facts of *Ricci* differ significantly from the facts of the instant matter. (*Id.* at 5–6.) Therefore, Plaintiff concurs with *UPS I* that *Ricci* is inapposite. (*Id.* at 6.) In Court addition, Plaintiff objects to Defendant's suggestion that an issue of first impression is sufficient to satisfy the "difference of opinion" prong of the requirements for certification of an interlocutory order. (*Id.*)

Plaintiff also maintains that Defendant fails to establish the third requirement of § 1292(d)–that certification of *UPS I* for interlocutory review will advance the instant litigation. (*Id.* at 7.) Plaintiff

posits that "reversal is extremely unlikely given the settled legal principles applied in this case," that "interlocutory review would not address the issues of liability and any additional penalty payments owed by UPS," and that "UPS identifies no cases pending before the [CIT] or [CAFC] for which immediate resolution of its proposed question for certification will have an effect." (*Id.* at 7–8.) Plaintiff adds that interlocutory appeal will "result in increased delays, greater expense, and the added burden of piecemeal litigation and appellate review" and would be "unlikely to lead to a speedy settlement." (*Id.* at 8.)

Lastly, Plaintiff entreats this Court to deny Defendant's request to stay proceedings because "a stay of proceedings would visit extreme hardship on the Government and result in judicial inefficiency." (*Id.*)

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C.§ 1582(1) (2000).

DISCUSSION

As previously noted, this Court's authority to certify an interlocutory order is provided in 28 U.S.C. § 1292(d)(1). A parallel provision allows district court judges to certify an order not otherwise immediately appealable provided the "order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (2000) ("§ 1292(b)"). The text of § 1292(b) and § 1292(d) are substantially similar, and there is very little case law in this court interpreting the requirements of § 1292(d). Thus, this Court finds cases interpreting § 1292(b) to be instructive in determining whether this Court's order in *UPS I* and the question presented therein satisfy the prerequisites for interlocutory appeal pursuant to § 1292(d).[5]

The legislative history for § 1292(b) indicates that the provision is to be applied sparingly and "only in exceptional cases where intermediate appeal may avoid protracted and expensive litigation." *Milbert v. Bison Labs., Inc.*, 260 F.2d 431, 433 (3rd Cir. 1958); *see also United States v. Dantzler Lumber & Export Co.*, 17 CIT 178, 180 (1993) (quoting *Milbert* for limitation on use of § 1292(d)(1)). Section 1292(b) "was not intended merely to provide review of difficult rulings in hard cases." *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966). Although this Court's ruling in *UPS I* was a difficult rul-

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[5] This Court notes that prior CIT opinions have also relied upon cases interpreting § 1292(b) when considering requests for interlocutory appeal pursuant to § 1292(d). *See e.g., United States v. Kingshead Corp.*, 13 CIT 961 (1989).

ing in a hard case, this Court nevertheless finds–for the reasons set forth herein–that the requirements of § 1292(d) have been met. Accordingly, this Court certifies the substantive question of law presented in *UPS I* for interlocutory appeal.

I. *Requirements for Interlocutory Appeal*

Section 1292(d) sets forth three requirements for certifying an order not otherwise immediately appealable. The order must (1) involve a controlling question of law (2) with respect to which there is substantial ground for difference of opinion, and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(d). This statutory provision may also be read as delimiting "four statutory criteria:" (1) "there must be a question of *law*," (2) "it must be *controlling*," (3) "it must be *contestable*, and" (4) "its resolution must promise to *speed up* the litigation." *Ahrenholz v. Bd. of Tr. of Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000) (interpreting § 1292(b)); *but cf. Volkswagen of Am., Inc. v. United States*, 22 CIT 280, 284, 4 F. Supp. 2d 1259 (1998) (where court delimited only two requirements under § 1292(d)). All elements must be present before this Court will grant an interlocutory order. *Cf. Ahrenholz*, 219 F.3d at 676 ("The criteria are conjunctive, not disjunctive.") Further, it is irrelevant to this analysis that the issue before the court is novel. *See Krangel v. Gen. Dynamics Corp.*, 968 F.2d 914 (9th Cir. 1992) (interpreting § 1292(b)). With this preface in mind, an analysis of each requirement will be taken in turn.

A. *Question of Law*

The first requirement of § 1292(d) is that there be a "question of law." 28 U.S.C. § 1292(d)(1). A "question of law" is one involving "the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *Ahrenholz*, 219 F.3d at 676. To be a reviewable interlocutory order, the case must turn "on a pure question of law, something the court of appeals [can] decide quickly and cleanly without having to study the record." *Id.* at 677. Because the relevant issue in *UPS I* was limited to the interpretation of the monetary penalty language in § 1641(d)(2)(A), a "pure" question of law is presented.

B. *Controlling*

The second criteria for certification of an interlocutory order pursuant to § 1292(d) is that the question of law be "controlling." 28 U.S.C. § 1292(d)(1). In order for the question of law to be "controlling," it need not resolve the action in its entirety. *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982) (interpreting § 1292(b)).

> Controlling questions of law that fall within this category of dispositive issues include the question of whether a claim exists as a matter of law, the question of whether a defense that will defeat the claim is available, and questions as to subject matter jurisdiction, proper venue, personal jurisdiction, and standing to maintain the action."

19 James Wm. Moore et al., *Moore's Federal Practice* ¶ 203.31[2] (3d ed. 2006) (interpreting § 1292(b)). "A controlling question of law must encompass at the very least every order which, if erroneous, would be reversible error on final appeal." *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3rd Cir. 1974) (interpreting § 1292(b)). However, the order need not be determinative of any of the plaintiff's claims on the merits. *Id.* "'[C]ontrolling' means serious to the conduct of the litigation, either practically or legally." *Id.* "[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of the litigation in the district court." *Cement Antitrust*, 673 F.2d at 1026.

This Court does not interpret the "controlling" requirement to be satisfied merely if resolution of the issue on interlocutory appeal will "appreciably shorten the time, effort, or expense of conducting litigation." *Id.* at 1027. To interpret the "controlling" requirement in this manner renders the requirement nugatory. "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (citations and internal quotations omitted). Because Congress chose to include the additional requirement in § 1292(d) that the "question materially advance the litigation in order for it to be immediately reviewable," the "controlling" requirement and the expediency requirement may not be read as being interchangeable. *Cement Antitrust*, 673 F.2d 1027.

In this matter, this Court finds that the order issued in *UPS I* raises a controlling question of law. If this Court's interpretation of § 1641(d)(2)(A) is erroneous, reversible error would result on final appeal. Further, resolution of the interpretation of § 1641(d)(2)(A) is serious to the conduct of this litigation because the statutory provision delimits the extent to which Plaintiff can recover the penalties it has sought to impose upon Defendant. Likewise, a ruling contrary to that rendered in *UPS I* could affect Plaintiff's ability to prosecute its claims in this matter.

C. *Difference of Opinion*

The next statutory requirement that must be satisfied is that there be "a substantial ground for difference of opinion." 28 U.S.C. § 1292(d). Clearly, there is a difference of opinion between Customs and Defendant as to the interpretation of § 1641(d)(2)(A). That difference of opinion gave rise to the present litigation. Further, this

Court finds that the ground on which the parties differ in the statutory interpretation is "substantial." Defendant's interpretation could seriously curtail Plaintiff's ability to enforce the laws and regulations applicable to customs brokers. Conversely, and from Defendant's perspective, the interpretation of § 1641(d)(2)(A) adopted by Customs and affirmed by this Court may expose customs brokers to increased penalties for their failure to satisfy statutory and regulatory obligations. In addition, as Defendant points out, the interpretation of the penalty maximum in § 1641(d)(2)(A) is one of first impression and "has a potentially significant and wide-reaching impact on the entire customs brokerage industry." (Def.'s Mem. 10.) Accordingly, the third requirement of § 1292(d) is satisfied.

D. *Advance the Litigation*

The final requirement of § 1292(d) is that resolution of the issue on interlocutory appeal "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(d)(1). If the CAFC accepts the certified question on interlocutory appeal, it may affirm or reverse this Court's opinion in *UPS I*. If a reversal is ordered, the CAFC need not do so for the reasons Defendant propounds. However, if a reversal does occur for either reason[6] argued by Defendant, this litigation will likely come to a swift end. Decision in Defendant's favor may prevent Plaintiff from pursuing any penalties against Defendant or may significantly reduce the amount of penalties available to Customs from UPS. On the other hand, if the CAFC were to affirm this Court's order in *UPS I*, the parties might be spurred to settlement, thereby avoiding the expense and delayed outcome associated with trial or awaiting decision on the pending motion for summary judgment. Although, as a general principle, this Court does not envision protracted and expensive litigation related to this matter, the Court recognizes Defendant's interest in possibly concluding this matter sooner rather than later. Accordingly, this Court finds that resolution of the interpretation of § 1641(d)(2)(A) will materially advance the ultimate termination of this litigation.

II. *Applicability of Ricci*

Defendant places great emphasis on the relevance of *Ricci* to this matter. Because this Court does not agree, it will address separately Defendant's efforts to create a precedent where none exists. Despite Defendant's contentions to the contrary, *Ricci* is not instructive on

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[6] In *UPS I*, Defendant argued that either (1) Plaintiff is limited to one-and-only-one penalty notice covering all violations prior to the date the pre-penalty notice was issued; or (2) the aggregate monetary penalty cannot exceed $30,000 for all violations preceding the issuance of the first pre-penalty notice. (Defendant's R. 56 Mot. for Summ. J. 2; Mem. of Law in Supp. of Def.'s Mot. for Summ. J. 13, 21.) This Court notes that in its Motion to Certify Defendant attempts to soften its position somewhat from that taken in its motion for summary judgment, but that attempt is without import here. *See infra* note 8.

the issue that was before this Court in *UPS I*. The *Ricci* court informs only on the matter of the amount of broker penalty appropriate under the facts of that case for the *one* pre-penalty/penalty notice Customs issued. This Court has not yet reached consideration of whether the penalty amounts sought by Customs are appropriate. At such point that this Court reaches the appropriateness of the specific penalties Customs is seeking to enforce against UPS will this Court have need to look to *Ricci* for instruction.

The relevant issue before this Court in *UPS I* was the application of the statutory cap on penalties as delimited in § 1641(d)(2)(A) to *multiple* pre-penalty/penalty notices issued by Customs to UPS. *Ricci* mentioned the § 1641(d)(2)(A) statutory cap on penalties merely in passing. The statutory penalty cap had bearing on the issue before the *Ricci* court only to the extent that the court was tasked with determining whether the $30,000 maximum penalty was appropriate given the facts of the case before it. Thus, this Court stands by its finding in *UPS I* that *Ricci* is inapposite.

Defendant claims that the *Ricci* court was "interpreting" § 1641(d)(2)(A) when the court stated that "[t]he statute limits the amount of monetary penalty the Secretary may impose to $30,000." (Def.'s Reply 6 (*quoting Ricci*, 21 CIT at 1147).) Therefore, Defendant adduces that this Court's holding in *UPS I* and *Ricci* are in conflict. However, Defendant's assertion is without merit.

The *Ricci* court was *not* "interpreting" § 1641(d)(2)(A) but rather simply stating the limitation imposed by the statute. This Court does not dispute the statutory limitation or the *Ricci* court's restatement thereof. For the *one* penalty notice at issue in *Ricci*, Customs was limited by § 1641(d)(2)(A) to a $30,000 monetary penalty.[7] This Court differs from Defendant's reading of *Ricci* in that Defendant wants the $30,000 maximum penalty to cover any and all unspecified violations of a broker's obligations prior to the issuance of the first pre-penalty notice.[8] (*See* Defendant's R. 56 Mot. for Summ. J. 2; Mem. of Law in Supp. of Def.'s Mot. for Summ. J. 13, 21.)

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[7] For this reason, it is irrelevant that the *Ricci* court did not mention the mitigation guidelines audit provision. Section XII of the mitigation guidelines states that "[f]rom any one audit the maximum aggregate penalty for all violations discovered is $30,000." 19 C.F.R. Pt. 171, App. C, Sect. XII.C. (2006). This provision suggests that Customs could issue several penalty notices for several violations (whether related or unrelated) discovered during an audit. However, Customs would be limited to an aggregate penalty of $30,000 for those several penalty notices. As Plaintiff points out, "a discussion of both [penalty mitigation] guideline sections in *Ricci* would have been redundant because, under *Ricci's* facts, both provisions arrive at the same conclusion of a maximum suggested penalty of $30,000." (Pl.'s Resp. 6.)

[8] Defendant adopts a softer position in its brief in support of its Motion to Certify by conceding "that Customs would [not] be prevented from initiating a separate penalty proceeding subject to the $30,000 maximum for . . . an unrelated violation that occurred prior to the first pre-penalty notice issued here." (Def.'s Mem. 5.)

However, this Court does not read § 1641(d)(2)(A) or *Ricci* to support Defendant's position and held such in *UPS I*. Unlike *Ricci*, this Court *did* interpret § 1641(d)(2)(A) and held that Customs is limited to a $30,000 penalty demand for *each* penalty notice Customs issues pursuant to the statute. Again, the *Ricci* court had no reason to and did not consider § 1641(d)(2)(A) in the context of multiple penalty notices because there was only *one* penalty notice before that court.

Defendant has unconvincingly attempted to create a "divergence" (Def.'s Reply 7) between this Court's opinion in *UPS I* and *Ricci* where none exists. While this Court found that there is "a substantial ground for difference of opinion," 19 U.S.C. § 1292(d), as to the interpretation of § 1641(d)(2)(A), that difference is not premised on Defendant's reading of *Ricci*.

III. *Other Arguments*

Defendant raises a number of other issues that are more appropriate in the context of a motion for rehearing. Although Defendant did not file such a motion, the Court will dispose of the additional arguments here.

Defendant contends that it and "similarly-situated" customs brokers are–by the ruling of this Court in *UPS I*–subject to "unlimited penalty exposure." (Def.'s Reply 9.) If by "similarly–situated" customs brokers, Defendant means other brokers that allegedly flagrantly violate customs laws, ignore direction from and training by Customs, and misstate their own efforts to correct the alleged violations, this Court suggests that these brokers might well be subject to penalties. However, Defendant overstates its case by claiming that it and its ilk are now exposed to unlimited penalties. There is no indication from Customs's past practice that it will aggressively pursue multiple penalties against one broker. However, if it does, this Court remains a check on the imposition of excessive penalties by Customs. *See Ricci*, 21 CIT at 1146 ("This *de novo* standard [of review] . . . applies to . . . the amount of the penalty. . . . The Court is directed to determine the amount of penalty, if any, independently of Customs' decision.").

Lastly, Defendant points out that "[b]oth sections [V.D. and XI.B.] of the Mitigation Guidelines pertain to penalties imposed under the authority of the same statute, 19 U.S.C. § 1641(d)(2)(A)." (Def.'s Reply 6.) The mitigation guidelines in section V are for violations of "any law enforced by the Customs Service or the rules or regulations issued under any such provisions" pursuant to 19 U.S.C. § 1641(d)(1)(C). 19 C.F.R. Pt. 171, App. C., Sect. V (2006). The mitigation guidelines in section XI apply to the "failure of a licensed broker to exercise responsible supervision and control over the customs business that it conducts" pursuant to 19 U.S.C. § 1641(b)(4). *Id.* at Sect. XI. By reference, the mitigation guidelines in section V may be read as applicable also to violations covered by section XI. According

to a guidelines note, "[a]ll penalties assessed for violation of 1641(b)(4) shall also cite section 1641(d)(1)(C) as the statute violated in all notices issued to the alleged violator." *Id.* at XI.A.

Section V of the mitigation guidelines cuts against Defendant's theory that Customs may only issue one penalty for similar violations. Section V.C.4. of the mitigation guidelines instructs that only one penalty should be issued for *contemporaneous* violations. *Id.* at Sect. V.C.4. (emphasis added) ("a separate penalty should not be assessed for each non-permitted transaction if numerous transactions occurred *contemporaneously*" (emphasis added)). The converse of this provision is that multiple penalty notices may issue for *non-contemporaneous* violations of a broker's obligations. In the matter before this Court, the separate penalties UPS received were for non-contemporaneous violations. Therefore, despite Defendant's protestations to the contrary, it appears that Customs has consistently interpreted § 1641(d)(2)(A) as providing it with the authority to issue multiple penalty notices for multiple violations of a broker's obligations. *See UPS I* at 32.

IV. *Stay of Proceedings*

Defendant has requested a stay of these proceedings pending the interlocutory appeal of the substantive legal issue addressed in *UPS I*. Whether to grant the requested stay lies within the discretion of this Court. Application for certification of an interlocutory order will stay proceedings in the CIT only if a judge of the CIT or CAFC orders such. 28 U.S.C. § 1292(d)(3) (2000).[9]

Although this Court is granting the requested stay, it is disappointed by Defendant's effort to discredit Plaintiff's position with regard to Defendant's motion to stay by referencing the newly-established March 2007 trial date. Defendant suggests that Plaintiff's request for a March 2007 trial date is subterfuge. (Def.'s Reply 10.) As Plaintiff explained in its motion to amend the scheduling order, co-counsel will be unavailable during late November and December on a family matter. In addition, Plaintiff's lead counsel represented that she would be engaged in a lengthy trial in October and again in January. Due to these exigencies, Plaintiff requested and Defendant did not oppose a March 2007 trial date.

Under the circumstances, the March 2007 trial date does not indicate to this Court that Plaintiff is unwilling or unable to proceed on the merits of this case. Rather, Plaintiff requested that this Court consider pre-existing commitments when re-scheduling the trial. After considering Plaintiff's motion and given Defendant's explicit con-

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[9] Specifically, the statute states that "[n]either the application for nor the granting of an appeal under this subsection shall stay proceedings in the [CIT] . . . unless a stay is ordered by a judge of the [CIT] . . . or by the [CAFC] or a judge of that court." 28 U.S.C. § 1292(d)(3).

sent, this Court granted Plaintiff's motion to amend the scheduling order, which established the March 2007 trial date.

Regardless, this Court finds that staying the proceedings pending resolution of the question certified for interlocutory appeal is in the best interests of the parties and the Court. Given the March 2007 trial date, neither party is likely to be seriously prejudiced by a stay of the proceedings. The issue presented to the CAFC for interlocutory appeal is central to Plaintiff's ability to prosecute its claims against Defendant. It would be inefficient to proceed to judgment on the pending motion for summary judgment or to proceed to trial, only to revisit the entire case in the event of a remand from the CAFC. Accordingly, this Court stays proceedings in this matter for thirty days following the CAFC's final decision concerning the certified question.

CONCLUSION

For the foregoing reasons, this Court finds that its opinion and order in *UPS I* involve a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Accordingly, this Court certifies the following question to the Court of Appeals for the Federal Circuit:

> Whether, pursuant to 19 U.S.C. § 1641(d)(1)(A), the United States Bureau of Customs and Border Protection may issue more than one penalty notice for a customs broker's alleged failure to exercise responsible supervision and control based upon the customs broker's alleged repeated misclassification of entered merchandise over a period of time and on multiple separate entry documents; and if so, whether the aggregate penalty sought from those multiple penalty notices may exceed $30,000.

Further, this Court stays proceedings in this matter until thirty days after the CAFC renders its decision on the appeal. Defendant's application to file a reply brief is granted. Defendant's motion for oral argument is denied.

So ordered.

Slip Op. 06–158

ONTARIO FOREST INDUSTRIES ASSOC. and ONTARIO LUMBER MANUFACTURERS ASSOC., Plaintiffs, v. THE UNITED STATES OF AMERICA, and SUSAN C. SCHWAB, Defendants, and COALITION FOR FAIR LUMBER IMPORTS EXECUTIVE COMMITTEE, Defendant-Intervenors.

Before: Pogue, Judge

Ct. No. 06–00156

Decided: October 24, 2006

[Plaintiffs' motion for reconsideration denied.]

Baker & Hostetler, LLP (*Elliot Jay Feldman, Bryan Jay Brown, John Burke,* and *Michael Steven Snarr*) for Plaintiffs;

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen Carl Tosini*, Trial Attorney) for Defendant United States;

Dewey Ballantine LLP (*Harry L. Clark, Kevin M. Dempsey, John W. Bohn*) for Defendant-Intervenor.

ORDER

Pogue Judge: Before the court is Plaintiffs' motion for reconsideration pursuant to Section 301 of the Customs Courts Act of 1980, 28 U.S.C. § 2646, and USCIT R. 59. By their motion, Plaintiffs ask the court to reconsider the court's opinion and vacate its final judgment in *Ontario Forest Industries Assoc. v. United States*, 30 CIT ___ ,444 F. Supp. 2d 1309 (2006)(hereinafter "*Ontario Forest*"). For the reasons stated below, Plaintiffs' motion is denied.

A motion for reconsideration is generally granted only to rectify a significant flaw in the original proceeding, such as the emergence of new, previously undiscoverable, evidence. *See, e.g., Am. Nat'l Fire Ins. Co. v. United States*, 30 CIT ___ , ___ , Slip Op. 06–136 at 2 (Sept. 7, 2006). "A motion for reconsideration will not be granted merely to give a losing party another chance to re- litigate the case or present arguments it previously raised." *Id.*, citing *United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 336, 337, 601 F. Supp. 212, 214 (1984). In addition, the grant of a motion for reconsideration lies within the discretion of the court.

In *Ontario Forest*, this court denied Plaintiffs' petition for a writ of mandamus, choosing, *inter alia*, to abstain from intervening in a dispute between the United States and Canada under the NAFTA binational review system. In doing so, the court noted that the governments of the United States and Canada "appear to be attempting to negotiate in good-faith a resolution to this matter." *Ontario Forest* 30 CIT at ___ , 444 F. Supp. 2d at 1329.

Plaintiffs seek reconsideration alleging, without a basis in fact, that the settlement negotiations between the governments of the United States and Canada "have now ended," Pls.' Mem. Supp. Mot. Recons. 4, and asserting that, as a result, the facutal basis for the court's abstention from assertion of jurisdiction no longer exists, *id.* at 4, 9–10.

As Plaintiffs' motion is not founded on any factual showing that could indicate an error or change of circumstance relating to the court's original opinion, Plaintiffs' motion is therefore simply an attempt to obtain another chance to re-litigate their case. As such, it must be and is hereby DENIED.

It is SO ORDERED.